Supreme Court, U.S.
FILED

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

CHARLES BRADLEY,
Petitioner

v.

PEOPLE OF THE STATE OF COLORADO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT IN AND FOR THE COUNTY OF JEFFERSON, STATE OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the District Court, County of Jefferson, State of Colorado [hereinafter the "District Court"], erred in affirming the conviction by the County Court, County of Jefferson, State of Colorado, [hereinafter the "County Court"] of Defendant for driving under the influence of alcohol by determining that the violation of Petitioner's right to effective assistance of counsel under the sixth amendment to the United States Constitution, which occurred when the Respondent People of the State of Colorado misappropriated the Petitioner-Defendant's expert witness by eliciting testimony from the expert in support of Respondent's affirmative case (where the Respondent did not demonstrate need for such testimony and there was prejudice to the Petitioner), was irrelevant and did not constitute grounds for reversal.

LIST OF PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties to the proceedings in the District and County Courts of Jefferson County, State of Colorado and in the Supreme Court of the State of Colorado.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT IN AND FOR THE COUNTY OF JEFFERSON, STATE OF COLORADO

Petitioner Charles R. Bradley, Defendant below, [hereinafter "Petitioner" or "Defendant"], by and through undersigned counsel, hereby respectfully prays that a Writ of Certiorari issue to review the judgment of the District Court in and for the County of Jefferson State of Colorado entered in the above titled case on April 22, 1993, review of which was denied by the Colorado Supreme Court on August 23, 1993.

OPINION BELOW

The April 22, 1993 opinion of the Jefferson County District Court in *The People of The State of Colorado v. Charles Bradley*, 92 CR 917, Div. JDZ, (Jefferson County District Court, State of Colorado) affirming the Defendant's conviction for driving under the influence of alcohol is unpublished and is reprinted in Appendix B to this Petition at B-1 to 3. The subject evidentiary ruling of the County Court of Jefferson County, State of Colorado in Case No. 91T9042, (in which case Petitioner was convicted of driving under the influence of alcohol), occurred during trial dated April 2-3, 1992, is also unpublished and is reprinted in Appendix C to this Petition at C-1 to 2. Also included in Appendix A is the Order of the Colorado Supreme Court denying Petitioner's Petition for Writ of Certiorari in that court.

GROUNDS OF JURISDICTION

The judgment of the Colorado Supreme Court denying the Petitioner's Petition For Writ of Certiorari in that court, which Petition sought review of the judgments of the County and District Courts was entered on August 23, 1993.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES, AND REGULATIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Pretrial Procedure

This case arises from the arrest and subsequent filing of a Uniform Summons and Complaint or Penalty Assessment by the Respondent People of the State of Colorado [hereinafter the "People or "Prosecution"] against the Defendant Petitioner on or about May 24, 1991 alleging violations of *Colo.Rev.Stat.* Section 42-4-1202 (1)(A) and *Colo.Rev.Stat.* Section 42-4-1202, 1.5. relating to the operation of a motor vehicle while under the influence of alcohol.[R:1].

On or about June 28, 1991 the Defendant pleaded not guilty [R:2]. Defendant moved to dismiss or, in the alternative, suppress all statements and evidence of roadside sobriety tests and breath tests. [R:3-4, and 6-9]. Hearing on the motions was held on February 7, 1992 at which time the Court denied the motion(s). Trial was scheduled for and held April 2-3, 1992.

Defendant's primary witness was Dr. Dale Wingeleth [hereinafter sometimes "the Doctor"], endorsed as an expert by the Defendant in the field of forensic chemistry only.

[Vol.III at pg 207, lns. 5-9]. This petition concerns the improper use of Dr. Wingeleth's testimony by the prosecution.

Dr. Wingeleth was employed by the Defendant many months prior to trial. The Doctor provided a written report of his chemical findings to the Defendant dated July 19, 1991. At that time he was clearly in the employ of the Defendant. Nevertheless, the prosecution then listed him as its expert [in toxicology, not chemistry] in its witness list dated October 8, 1991. [R: Vol.III pg. 231, ln. 12]. The Defendant, in accord with his previous hiring of Dr. Wingeleth listed him in his disclosure statement dated November 4, 1991 [Id. at pg. 232, ln. 14]. The Prosecution mailed the Doctor a subpoena to appear but he never returned a waiver of service. Since mailing a subpoena is not permitted under *Colo.R.Civ.Pro.* 45, there is no evidence the Doctor was properly served with one by the Prosecution. [Id. at pg. 233, lns. 6-7 and 20-21]. Dr. Wingeleth was clearly the Defendant's witness as was ultimately acknowledged by the trial court. [Id. at pg. 249, ln. 10].

In spite of its attempt to endorse Dr. Wingeleth as its expert toxicologist, the Prosecution made no attempt to call

Dr. Wingeleth in its case. The Prosecution did not raise any reasons, compelling or otherwise, why it did not call Dr. Wingeleth during its case or why it could not call another expert in forensic toxicology in his place. The Prosecution knew at least as early as November 4, 1991, if not earlier, that Dr. Wingeleth had been employed by the Defendant since at least July of 1991 and could have made arrangements for another expert, but did not.

At Trial

Dr. Wingeleth testified to his credentials as a forensic chemist and was found qualified by the Court as an expert only in that field, in spite of the prosecution's request to qualify him as a forensic toxicologist as well. [Vol.III at pg 207.

Dr. Wingeleth testified that he had obtained, through counsel, the reserve breath sample of the Defendant taken after arrest by the arresting officer using the Intoxilizer 5000 blood alcohol analysis machine, had analyzed it and found that it showed an alcohol content of .167. [Id. at pg. 210 ln. 19 to pg. 212, ln. 8]. The Doctor testified that the difference in blood alcohol levels between the test results he obtained from

the sample and those obtained by the arresting officer (who testified that the results of the test at that time showed an alcohol level of .194 grams of alcohol per 210 liters of breath [Vol.III, at pg. 107, lns. 7-8]).was so great that it could not be concluded to a reasonable degree of scientific certainty that either the primary sample testified to by the arresting officer or Dr. Wingeleth's sample gave an accurate reading of the alcohol content of the Defendant at the time taken. [Id. pg. 213, ln. 5 to pg. 214, ln. 11; pg. 219, lns. 5-17].

Upon cross examination, the prosecution attempted to elicit from Dr. Wingeleth evidence as to what visible affects would be apparent in a person whose blood contained various particular levels of alcohol. [Id. at pg 220, lns.15-20; pg. 226, lns. 17-19] [hereinafter the "alcohol effects"]. These alcohol effects are within the science of forensic toxicology and not forensic chemistry. The Doctor was endorsed as a witness only in the field of forensic chemistry.

Defendant's counsel objected on the grounds that the information sought was not within the scope of Dr. Wingeleth's testimony nor was it within the scope of the field in which Dr. Wingeleth had been qualified to testify, namely

forensic chemistry. [Id. at pg. 220, lns. 22-25]. The trial court sustained the objection and noted that Dr. Wingeleth was qualified only as a forensic chemist. [Id. at pg. 221, lns. 9-12].

Shortly thereafter, the Prosecution attempted again to elicit information regarding the physical effects on a person of various levels of alcohol in the blood, in spite of the trial court's prior ruling. [Id. at pg. 226, lns. 17-19]. Counsel for the defense objected, again, that the question was beyond the scope of direct and beyond the witness's qualification [Id at lns. 20-23]. The trial court then excused the jury. [Id. at pg 227, lns. 3-8]. After argument, the jury was returned and the trial court sustained the defense objection [Id. at pg. 235, lns. 14-15].

Thereafter, the trial court excused the jury to deal with an unrelated evidentiary objection raised by the Prosecution. [Id. at lns. 6-7; 13-25]. The trial court sustained that objection. [Id. at pg. 248, lns. 1-15]. Prior to returning the jury to the court room, however, the trial court ordered a recess and then went back on the record out of the presence of the jury. The trial court, without warning, reversed her rulings on Defendant's prior objection to allowing the

Prosecution to question Dr. Wingeleth regarding the toxicological alcohol effects and allowed the Prosecution to pursue its questioning of Dr. Wingeleth in that regard. [Id. at pg 249, lns. 1-19] [hereinafter the "reversal"].

The trial court noted that because the Prosecution would not be allowed to call Dr. Wingeleth in rebuttal (as he was a witness for the Defendant), the court would allow the Prosecution to elicit his testimony on cross examination regarding the alcohol effects [even though the court had not qualified him as a forensic toxicologist to so testify]. [Id.] Counsel for the Defendant again noted his objection for the record. [Id. at 250, lns. 3-5]. *See* Appendix B. The court's comments regarding the impropriety of allowing the Prosecution to use Dr. Wingeleth on rebuttal is the first specific mention in the record of the impropriety of allowing the Prosecution to misappropriate the Defendant's expert. The Defendant, as stated above, objected to allowing such questions. [Vol.III, at 250, lns. 3-5]

The trial court did not explain her reversal of course to the jury other than to say that she had reversed herself on a previous ruling on an objection by defense counsel, and had

Dr. Wingeleth reappear for examination by the Prosecution. [Id. at 251, lns. 12-17]. Thereafter the district attorney questioned Dr. Wingeleth with regard to the noticeable effects on an individual of alcohol at varying levels of concentration. [Id. at 251, ln. 20 to pg. 257, ln. 25.] Defense counsel cross examined. [Id. at pg. 258, ln.4 to pg. 263, ln. 25].

Closing arguments were made after the court instructed the jury on the applicable law. The Prosecution made extensive reference to Dr. Wingeleth's testimony regarding alcohol effects and used it to argue to the jury that it corroborated the Intoxilizer 5000 test results, in spite of Dr. Wingeleth's testimony that scientifically, both test results were invalid. [Id. at 342, ln. 2 to 343, ln. 24.].

Conviction and Appeal

After deliberation, the jury returned a guilty verdict on both counts. [Id. at 347, ln.24 to 348, ln.4.]. Appeal followed to the District Court under *Colo.R.Crim.Pro.* 37. Pursuant to that rule, briefs were filed by both parties addressing the errors in the trial court but no oral argument was held.

The Defendant expressly raised the issues regarding ineffective assistance of counsel under the Sixth Amendment

to the United States Constitution in his opening and reply briefs on appeal arguing that, by allowing the Prosecution to elicit from Dr. Wingeleth the *toxicology* testimony on cross examination (which the trial court considered improper for the prosecution to elicit on rebuttal), that court effectively allowed the prosecution to usurp or misappropriate the Defendant's expert, in violation of the Sixth Amendment right to effective assistance of counsel discussed in *People v. Perez*, 745 P.2d 650 (Colo. 1987) and *Hutchinson v. People*, 742 P.2d 875 (Colo. 1987). Excerpts of relevant portions of the briefs in which these issues were raised by Petitioner are included in Appendix D hereto.

The District Court affirmed the County Court on the basis that the matter was merely one regarding the corroboration of evidence, was within the scope of cross-examination and was within the trial court's discretion, refusing to acknowledge the Sixth Amendment right to counsel implications raised by *Perez* and *Hutchinson, supra.* The District Court distinguished those cases on the basis that the Prosecution's misappropriation did not occur during its case-in-chief, in spite of the fact that both cases leave open

the question of whether the Sixth Amendment right to be free from prosecutorial misappropriation of defense experts is limited to the case-in-chief, and *Perez* implies strongly that factors other than the issue of "case-in-chief vs. rebutal" should control. The District Court's distinction also ignores the fact that the prosecutorial misappropriation in this instance did not occur on rebutal. A copy of the District Court opinion appears in Appendix B.

Since *Colo.R.Crim.Pro.*37 does not provide for intermediate appeal to the Colorado Court of Appeals and does not provide for rehearing in the District Court, the Defendant filed his Petition for Writ of Certiorari in the Supreme Court of Colorado on or about June 7, 1993, again raising the Sixth Amendment issues. A copy of the relevant portion of that Petition is included in Appendix D at pages 12-14. That court, in its discretion, declined to hear the matter and denied the Petition in an Order dated August 23, 1993. That Order is included in Appendix A.

This Petition follows.

REASONS FOR GRANTING THIS WRIT

A. Introduction.

The trial court's ruling, allowing the Prosecution to elicit on cross examination Dr. Wingeleth's testimony, as a toxicologist, regarding the alcohol effects, when he was endorsed by Defendant only as a chemist and was not offered by the Defendant as a toxicologist, had the effect of converting Dr. Wingeleth from the Defendant's witness to the Prosecution's witness, or at least so confusing the two so as to lead to jury confusion.

The Prosecution had previously sought the Doctor's toxicological testimony for its case by attempting to endorse him on its witness list. It did not make such use of him at trial, but, upon realizing its position, attempted to obtain the same testimony by the "back-door" of cross-examination. Had the Doctor been endorsed by the Defendant as a toxicologist and testified on direct regarding the alcohol effects, the result might be different. However, the Doctor was not so endorsed and the effect of entering that back door was to give the prosecution testimony through Defendant's expert it originally intended for its case in chief.

This trip through the back door deprived the Defendant of the effective assistance of counsel guaranteed him by the Constitution of the United States as interpreted in *Perez* and *Hutchinson*, *supra*. If Defendant had known that Dr. Wingeleth might be called by the prosecution in support of its own case, he would not have endorsed the Doctor. But, because the Doctor had analyzed the Defendant's only breath sample left from the arrest in July of 1991, Defendant was locked into using Dr. Wingeleth and could not change his expert.

Cases such as *Hutchinson* and *Perez*, cases prevent the Prosecution from misappropriating a Defendant's expert for the very reasons that a defendant should not have to be concerned with an expert's disloyalty, nor with limiting the information he can give the expert, nor with being concerned with his choice of expert. *Hutchinson*, 742 P.2d at 882-884.

The District Court, however, dismissed the importance and relevance of the Sixth Amendment right to be free from prosecutorial misappropriation of defense experts, as an adjunct of effective assistance of counsel, either because it did not believe that such a right exists or because the

misappropriation did not occur during the Prosecution's case-in-chief, regardless of the lack of need by the Prosecution or the prejudice to the Defendant.

The District Court's rationale thus provides special and important reasons for this Court to exercise its discretion to grant this Petition, as enumerated in *Supreme Court Rule* 10. First, the District Court, being the state court of last resort under *Colo.R.Crim.Pro.*37 has decided an important question of federal law which has not been, but should be decided by this Court, namely, the parameters of the Sixth Amendment right to be free from prosecutorial misappropriation of defense experts. As discussed below, this issue is an open one and begs for resolution by this Court.

Second, a question of substance, namely the Defendant's right to be free from prosecutorial misappropriation of defense experts, as an adjunct of the right to effective assistance of counsel, has been decided by the District Court in a way that conflicts with the decisions of other state courts of last resort or of one or more United States courts of appeals. This Court is the only one which

can sort out the confusion regarding the constitutional right at issue.

B. This Court Should Exercise Its Discretion And Grant This Petition Because Courts Of The Various States And The Federal Circuits Are In Conflict About The Sixth Amendment Rights At Issue.

The trial court reversed its previous rulings and allowed Dr. Wingeleth to testify as a toxicologist regarding alcohol effects because, in a curious twist, it was concerned about the case law which indicates that the Prosecution may not steal a defense expert witness and use him to its own ends. That case law provides that the prosecution may make no affirmative use of a defendant's expert witness other than to cross examine him, as with any other witness. It is reversible error to allow the Prosecution to do otherwise. The *Perez and Hutchinson* cases, *supra* are the Colorado cases which stand for that proposition.

This Court apparently has not addressed the issue before. Several state courts and several federal courts of appeals have addressed the issue and have reached conflicting results. Colorado has, obviously, held that the Sixth

Amendment prohibits prosecutorial misappropriation of defense experts.

No better description of the rationale for a Sixth Amendment prohibition on prosecutorial misappropriation appears than that given by the Colorado Supreme Court in *Hutchinson*:

> The sixth amendment to the United States Constitution and article II, section 16 of the Colorado Constitution guarantee a criminal defendant the right to counsel. That right is as fundamental component of our criminal justice system. United States v. Cronic, 466 U.S. 648, 653 [citations omitted](1984). It is now universally accepted that lawyers representing defendants in criminal cases are "necessities, not luxuries." Gideon v. Wainwright, 372 U.S. 335, 344, [citations omitted] (1963). Their presence is essential because they provide the means through which the other rights of the defendant are secured. Without counsel, the right to a trial itself would be "of

little avail." Cronic, 466 U.S. at 653 [citations omitted]; Powell v. Alabama, 287 U.S. 45, 68-69 [citations omitted] (1932). . . Indeed, the right to counsel is a significant component of a defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85 [citations omitted] (1984).

For that reason it has been recognized that the right to counsel includes the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 [citations omitted] (1970). . .

* * *

As part of his representation, counsel has a duty to make reasonable investigations in connection with the case or to make a reasonable decision that makes particular investigations are unnecessary. Strickland, 466 U.S. at 691 [citations omitted].

* * * *

In an increasing number of cases, proper trial preparation requires a defense attorney to consult an expert. Criminal cases commonly involve complex issues revolving around medical, psychiatric, scientific or accounting concepts. Frequently, in these types of cases, it is not only desirable--but absolutely vital-- that a defense attorney consult an expert for guidance and interpretation. Without such assistance, an attorney may be unable to rationally determine technical and evidentiary strategy or to properly prepare for cross-examination of the prosecutions witnesses or for presentation or rebuttal of physical evidence. [Citations omitted]. . . Consequently, it cannot be denied that a defense counsel's access to expert assistance is a crucial element in assuring a defendant's right to effective legal assistance, and ultimately a fair trial.

For that reason, we cannot sanction the prosecution's decision in this case to offer the defense's handwriting expert as a witness in its case-in-chief. Absent compelling justification or waiver, we believe that such a practice violates a defendant's right to effective assistance of counsel.

* * * *

As a practical matter, too, an expert hired by defense counsel is likely to feel a degree of loyalty to the defendant's cause. We need not ascribe this fact to base motives on the part of the experts: indeed the nature of the adversary process, the confidentiality surrounding legal representation and professional norms and ethics of particular experts all may foster this attitude of loyalty to the defendant.

We believe the confidentiality and loyalty of expert consultants traditionally enjoyed by defendants and defense counsel is a

crucial element in the effective legal representation of the defendant A relationship of trust permits the defendant, counsel and the expert to engage in a full and frank interchange, affording counsel an accurate and honest assessment of the defendant's case. Without such a relationship, the assistance of the expert and thus defense counsel, is likely to be ineffective.

Consequently, the prosecution should not be permitted to intrude upon the relationship as a matter of course and convert a defense witness into a potential witness-in-chief against the defendant. We can imagine few intrusions more disruptive to the efforts of defense counsel.

If we were to accept the reasoning of the People in this case, defense attorneys might be deterred from hiring experts lest they inadvertently create or substantially contribute to the prosecution's case against their clients.

Or, if an expert were hired, an attorney might have to insist on limited communications to assure his client protection if the expert were called as a state witness. As a protection, defense counsel might also tend to hire those experts whose opinions are more predictable--rather than independent experts--whose advice might be more helpful, but more risky to obtain. The result, we believe, would be would be marginal gains for the truth seeking function of the judicial process, but severe damage to the ability of defense attorneys to provide effective assistance of counsel.

* * *

[The prosecution's] practice is inconsistent with the meaningful adversarial exchange guaranteed by the sixth amendment and article II, and section 16 of the Colorado Constitution. As the Supreme Court has said, when the judicial process loses its character as confrontation between adversaries, the right to

> counsel has been violated. Cronic, 466 U.S. at 656-57, ...
>
> We draw support for our conclusion from the fundamental tenant underlying our adversarial system and inherent in the defendant's guarantees of counsel, due process and the privilege against self-incrimination that the defendant has a right to require the prosecution to investigate its own case, finds its own evidence and prove its own facts. [Citations omitted].

Hutchinson, 742 P.2d at 880-882.

The *Hutchinson* rationale is supported by numerous cases from other states. *See, e.g., State v. Toste*, 178 Conn. 626, 424 A.2d 293 (1979)*State v. Mingo*, 77 N.J. 576, 392 A.2d 590 (1978); *State v. Prate*, 284 Md. 516, 398 A.2d 421 (Ct.App. 1979); *People v. Knippenberg*, 66 Ill.2d 276, 362 N.E.2d 681 (1977); *State v. Kociolek*,23 N.J. 400, 129 A.2d 417 (1957). It is also supported by at least one federal circuit opinion, namely, *U.S. v. Alvarez*, 519 F.2d 1036 (3rd Cir. 1975).

In reaching its conclusion, the Colorado Supreme Court noted the existence of a split of authority. It cited a number of cases declining to find the same Sixth Amendment right it found. *See e.g. e.g., Noggle v. Marshall*, 706 F.2d 1408 (6th Cir.), *cert denied*, 464 U.S. 1010 (1983); *Edney v. Smith*, 425 F.Supp. 1038 (E.D.N.Y., 1976), *aff'd*, 556 F.2d 556 (2nd Cir.), *cert denied*,431 U.S. 958 (1977); *United States v. Talley*, 790 F.2d1468 (9th Cir.), *cert denied*, __ U.S.__, 107 S.Ct. 224-25 (1986); *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981), *cert denied*,455 U.S. 1003 (1982); *State v. Craney*, 347 N.W.2d 668 (Iowa),*cert denied*, 469 U.S. 884 (1984) and other cases listed at 742 P.2d at 884-885, n.6. [hereinafter the "footnote six cases"] However, it distinguished those cases on the basis that they were concerned with the misappropriation occurring on rebutal or in a phase of the trial other than the guilt phase.

While it distinguished the cases on those bases, it is clear that the court did not decide the case based on the distinction between rebuttal and case-in-chief. It noted that "[i]t is the function of this court to determine the proper scope of constitutional guarantees for criminal defendants in

this state. Accordingly we do not regard these cases as controlling." 742 P.2d at 885 Rather the Court choose not to address the issue of case-in-chief vs. rebuttal for the court expressly stated: "we emphasize that our holding today is of a limited nature. Our decision does not involve rebutal use of expert witnesses. . . .*Id.* The question is thus left open.

The *Hutchinson* case thus delineates a clear split of authority between Colorado and a number of other state courts on the one hand, and several federal courts of appeals and several other states on the other hand with regard to the sixth amendment right at issue.

The District Court here has apparently issued an opinion in line with the with the several state and federal courts of last resort which take a view opposite to its own state supreme court. This curious split of authority makes clear that only this Court can resolve this important constitutional debate and should review the parameters of the Sixth Amendment in this regard.

C. The District Court's Erroneous Reliance On The Rationale That The Offending Testimony Was Elicited On

Rebuttal Necessitates This Court's Review Of The Conflicting Case Authority.

To the extent that The District Court's decision was based upon its belief that the prohibition in *Hutchinson* did not apply to the Prosecution's rebuttal case, it has made two errors, both of which required this Court's intervention because of the implication of those errors on the Sixth Amendment right at issue and uniform constitutional interpretation.

1) The District Court's First Error.

As noted above, *Hutchinson*, expressly left open the question of the applicability of the right at issue if it is challenged in the rebuttal portion of the Prosecution's case. The *Hutchinson* Court, however, noted that it did not believe the issue of prosecutorial misappropriation of defense experts, as a violation of the Sixth Amendment, was a matter to be decided on a *per se* basis, but rather indicated:

> Further, we recognize and accept the view of the Supreme court that inquiries into claims of ineffective assistance of counsel should ordinarily focus on the facts of individual

> cases. See United States v. Cronic, 466 U.S. 648, 658 [citations omitted] (1984); Stickland v. Washington, 466 U.S> 668, 684-98 [citations omitted] (1984). Although some claims of ineffective assistance of counsel may be dealt with on a per se basis, we believe that the violation involved in this case requires a showing of prejudice to warrant relief. [Citing *Chronic, supra.*]. . . .The standard as set forth in Strickland is whether there is a reasonable probability that, absent the improperly used witness, the factfinder would have a reasonable doubt respecting guilt. [Citing *Strickland, supra,* at 695].

742 P.2d at 886. Thus, that court strongly implied that the mere fact that the misappropriation of the defense expert occurred during the Prosecution's rebuttal does not, by itself, determine that no constitutional violation has occurred. Rather a court should look to other factors which must be considered.

One of the other factors which must be considered is prejudice to the Defendant from the misappropriation of the defense expert. Another factor, more comprehensively discussed in *Perez, supra*, was the degree of need of the prosecution to make use of such expert. 745 P.2d at 652.

The first error of the District Court was to determine, on a *per se* basis, contrary to the case-by-case approach of *Cronic* and *Strickland*, as interpreted in *Hutchinson* and *Perez*, that because the Prosecution here did not use Dr. Wingeleth during its case-in-chief, there was no constitutional violation.

The Defendant, utilizing the case-by-case approach outlined above argued that the District Court should have considered the additional factors outlined in *Perez* and *Hutchinson*. First under *Perez*, the Prosecution demonstrated no compelling need to use Dr. Wingeleth. *Perez* expressly established that it is a violation of the Defendant's right to effective assistance of counsel for the prosecution to use the testimony of an expert witness hired by the Defendant unless the prosecution can establish "compelling circumstances for such use of an expert." *Id.* In this case, the prosecution did

not establish compelling grounds to misappropriate Dr. Wingeleth by making him the prosecution's expert in toxicology.

There is no evidence or argument in the record which even attempts to raise the issue of compelling grounds. Dr. Wingeleth's report is dated July 19, 1991, at which time he was in the employ of the Defendant. The Prosecution then listed him as its expert in its witness list dated October 8, 1991. [R: Vol.III pg. 231, ln. 12]. The Defendant, in accord with his previous hiring of Dr. Wingeleth, listed him in his disclosure statement dated November 4, 1991 [Id. at pg. 232, ln. 14]. The Prosecution mailed the doctor a subpoena to appear but he never returned a waiver of personal service and there is no evidence he was properly served personally with a subpoena by the prosecution, as required under the Colorado Rules of Civil Procedure. [Id. at pg. 233, lns. 6-7 and 20-21]. Dr. Wingeleth was clearly the Defendant's witness as was acknowledged by the trial court. [Id. at pg. 249, ln. 10].

The Prosecution made no attempt to call Dr. Wingeleth in its case. If its position was that Dr. Wingeleth was a prosecution witness, it could have attempted to do so

and qualify the doctor in forensic toxicology. The Prosecution could then have attempted to elicit on direct examination in its case the testimony it improperly sought to elicit after Dr. Wingeleth's direct examination for the Defense (subject to the Defendant's objections based on *Perez*). The Prosecution, however, did not raise any reasons, compelling or otherwise, why it did not call Dr. Wingeleth during its case or, more importantly, in light of *Hutchinson* and *Perez*, why it could not call another expert in forensic toxicology. The Prosecution knew at least as early as November 4, 1991, if not earlier, that Dr. Wingeleth had been employed by the Defendant since at least July of 1991 and could have made arrangements for another expert but did not. Thus the Prosecution has failed to establish any compelling need to use the Defendant's expert.

Second, under both *Perez* and *Hutchinson*, prejudice occurred to the Defendant by virtue of the Prosecution's misappropriation of Dr. Wingeleth.

Perez and *Hutchinson* require that the trial court assess the effect of the improper testimony by examining whether there" is a reasonable probability that absent the

improperly used witness, the fact finder would have had a reasonable doubt respecting guilt." *Perez*, 745 P.2d 652; *Hutchinson*, 742 P.2d at 886-887. If so, reversal is required. In *Perez* the Court applied this assessment as follows:

> Even without the testimony of Bradley [the expert therein, unrelated to Defendant in this case], the prosecution produced evidence sufficient to support the jury verdicts. However, we are unable to conclude that there was no reasonable probability that the jury would have reached the opposite conclusion. *See Hutchinson*, 742 P.2d at 887. . . . Without [the expert's] testimony--and without the impact on the jury of his having changed his opinion--the jury may have found defendant's case more compelling.

745 P.2d at 654. Thus, in *Perez*, even if there was sufficient evidence for the jury to convict in the absence of the expert's testimony, the court reversed the conviction where the absence of the tainted testimony may have caused the jury to decide for the defendant instead.

Defendant here presented an even more compelling circumstance for the application of similar reasoning and a finding of prejudice. During his initial testimony the Dr. Wingeleth testified, as a forensic chemist that due to the discrepancy in the results between the two breath tests, it was not possible to establish to a reasonable degree of scientific certainty that either one was correct or that the Defendant actually had an alcohol level over .10 grams per 210 liters of breath. [R:Vol.III, pg. 213, ln. 5 to pg. 214, ln. 11; pg. 219, lns. 5-17]. This testimony alone would have allowed the jury to find reasonable doubt as to Defendant's level of intoxication vis a vis the statutory levels. In its closing argument, the Prosecution made extensive use of Dr. Wingeleth's subsequent testimony as a toxicologist regarding the alcohol effects, to argue that the alcohol effects corroborated a breathalizer test reading over the statutory limit of .10 [Id. at 342, ln. 2 to 343, ln. 24]. This is the tainted testimony, and as in Perez, in the absence of the tainted testimony, the jury may have found Dr. Wingeleth's testimony that neither breath test result could be determined to be

accurate, sufficient to acquit. Thus, there was prejudice to the Defendant which required reversal.

The District Court's blanket rejection of the Sixth Amendment right asserted by the Defendant, merely because the Prosecution's misappropriation did not occur during its case-in-chief, without considering the issues of prosecutorial need or prejudice to the Defendant, is flatly contrary to the case-by-case analysis mandated in ineffective counsel cases by the case law of this Court and the Colorado Supreme Court. For that reason, review in this Court is appropriate. If the Sixth Amendment right at issue is to have any meaning, the boundaries of the right cannot be drawn at the end of the Prosecution's case-in-chief merely because it is convenient; to do so defeats the entire purpose of the right at issue.

2) The District Court's Second Error

By assuming that the *Hutchinson* and *Perez* cases established a *per se* rule that the right to be free from prosecutorial misappropriation of defense expert only applies in the prosecution's case-in-chief, the District Court has ignored a key factual distinction crucial to establishing the parameters of that right. Even if it is assumed, *arguendo*, that

the *Hutchinson* court would have followed the footnote six cases if the prosecutorial misappropriation in that case had occurred on rebuttal, there is a significant factual difference between the footnote six cases and this case which indicates that *Hutchinson* would still not support the District Court's affirmation of the evidentiary ruling in this case.

The majority of footnote six cases decline to recognize the right to be free from prosecutorial misappropriation of defense experts, on rebuttal, in circumstances where the prosecution called a defense expert in psychiatry or psychology to rebut statements made at trial by the defendants therein, or those of the defendants' other psychiatrists, with regard to the defendants' mental condition. *See, e.g., Edney v. Smith*, 425 F.Supp. 1038 (E.D.N.Y., 1976), *aff'd*, 556 F.2d 556 (2nd Cir.), *cert denied*,431 U.S. 958 (1977); *United States v. Talley*, 790 F.2d1468 (9th Cir.), *cert denied*, __ U.S.__, 107 S.Ct. 224-25 (1986); *Granviel v. Estelle*, 655 F.2d 673 (5th Cir.1981), *cert denied*,455 U.S. 1003 (1982); *State v. Carter*, 641 S.W.2d 54 (Mo. 1982),*cert denied*, 461 U.S.932 (1982).

Since the psychiatrists or psychologists called on rebuttal had examined the defendants, they had specific, relevant, first-hand data to rebut, head-to-head, factual inaccuracies in the defendant's own testimony or that of the defendants' other psychiatric or psychological experts This information could come from no-one else. Moreover, the defense experts forced to testify on rebuttal were testifying within the same scientific discipline for which the defendants hired them.

Thus, in these footnote six cases, the courts allowed use of defendants' experts on rebuttal because, in effect, the rebuttal was a direct factual rebuttal and could come from no-one else but the expert. Obviously, there were a limited number of persons who examined the defendants psychologically, and they were the defendant's experts. In short, the courts were inherently applying the necessity test in *Perez*, discussed above. No one but their experts could call the defendants (or their other experts) liars. Moreover, the courts were applying that test to circumstances where the experts forced to testify in rebuttal were from the same discipline as the defendants' experts being rebutted. Thus,

there was no inference in the footnote six cases that the prosecution was attempting to make its affirmative case on the backs of the defendants' experts by using them in rebuttal.

Such is not the case here, however, because, even though the Prosecution did not attempt to elicit Dr. Wingeleth's testimony on its case-in-chief, its examination of him with regard to the toxicological alcohol effects was clearly an attempt to make its affirmative case, supporting the arresting officer's observations of the Defendant's behavior, rather than to actually rebut Defendant's statements. The fact that the testimony was in the field in which the Prosecution originally endorsed and sought to qualify Dr. Wingeleth, a field other than the one for which Defendant hired him, confirms that the Prosecution was not truly using the Doctor as a rebuttal witness, but to help the Prosecution with its affirmative case. This conclusion is further confirmed by the trial court's express indication that the Prosecution would not be allowed to call Dr. Wingeleth *on rebuttal.* Thus, the only basis upon which his testimony regarding the alcohol effects can be viewed is in support of the Prosecution's affirmative case.

It is the very circumstance of this case which illuminates most clearly the fact that it was inappropriate for the District Court to affirm the bright line boundary that prosecutorial misappropriation of defense experts does not violate the Constitution so long as it does not literally occur during the prosecution's case-in-chief. *Huchinson* clearly counsel's that affirmative use violates the Sixth Amendment, regardless of when in the trial it occurs. The footnote six cases offer nothing of substance to change that conclusion. The District Court's reading of the right identified in *Hutchinson* is thus far too narrow. Now, only this Court can appropriately flesh-out the parameters of that right, in light of *Hutchinson* and the footnote six cases, on a basis that will provide reasoned justice under the circumstances, and guidance, not only for this case, but for all other courts faced with the same issue.

E. Summation.

In short, Dr. Wingeleth's testimony for the Prosecution regarding toxicological alcohol effects was precluded by the Sixth Amendment principles set forth in *Hutchinson* and *Perez*. The Prosecution's use of Dr.

Wingeleth falls squarely within the prohibition of those cases, and resulted in prejudice to the Defendant. The trial court itself was clearly concerned that to allow the Prosecution to inquire of Dr. Wingeleth on "rebuttal" in the areas of forensic toxicology would violate the Defendant's Sixth Amendment rights.

By allowing the Prosecution such inquiry anyway, the Prosecution was in effect given not merely rebuttal, but a second chance at its affirmative case. All the court did was to change the order of testimony; the substance, because the testimony dealt with toxicology and because the Doctor testified on direct examination, still converted Dr. Wingeleth into a Prosecution witness and under *Perez*, and *Hutchinson, supra,* deprived Defendant of effective assistance of counsel.

In spite of the obvious applicability of the cases, the District Court distinguished *Perez* and *Hutchinson* on the basis that the rule against misappropriation applied only to the Prosecution's use of the Defendant's expert in its case-in-chief. Consequently, it felt free to rest on the trial court's discretion in qualifying experts and establishing the scope of

cross examination, indicating that the tainted testimony was merely corroborative.

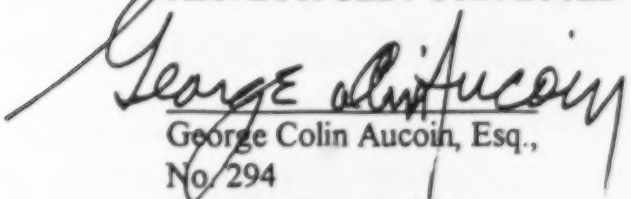
Such a view is too restrictive in view of the express purpose of the right, namely, to provide effective and loyal assistance of counsel through open and full investigation and discussion with experts. The District Court's confusion about the issue, to the point of finding both *Hutchinson* and *Perez* irrelevant, illustrates most strongly the need for this Court to now address the question to define the parameter of the right in question and to reverse the District Court's affirmation and remand the matter for a new trial.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable Court to review the judgment of the District Court of Jefferson County Colorado affirming the conviction of the Defendant in the County Court of Jefferson County Colorado in this case. In the event that the Petition is granted, Petitioner prays that the judgment of the Courts below be reversed, that the cause be remanded, and that the Courts below be directed to enter a judgment of not guilty in proceedings below.

DATED THIS 21st day of November, 1993.

RESPECTFULLY SUBMITTED



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